SUPREME COURT, U.S.

Supreme Court, U.S.
JUL 23 1971
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Supreme Court of the United States

OCTOBER TERM, 1971

71-120

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Central Gulf Steamship Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 26, 1971, which judgment reversed that of the District Court for the Southern District of New York. The District Court, sitting without a jury, had entered judgment in favor of the defendant and dismissed plaintiff-seaman's claim for maintenance and cure.

The Opinions of the Courts Below

The opinions of the District Court for the Southern District of New York and of the Court of Appeals for the Second Circuit are printed in the Appendix hereto. The District Court opinion is reported at 305 F. Supp. 1071. The Court of Appeals' opinion is not yet reported.

Jurisdiction

The decree of the Court of Appeals for the Second Circuit was entered on April 26, 1970.

The action was brought by libel and complaint filed by the seaman and is within the Admiralty and Maritime jurisdiction of the United States.

The jurisdiction of this Court to review, by way of Writ of Certiorari, the decree complained of its conferred by 28 U.S.C. Sections 1254 (1) and 2101 (c).

Questions Presented for Review

1. Whether a Seaman, who, on stipulated and uncontested facts, was found by the trier of facts to have "willfully" concealed a chronic, recurrent and known disabling condition from his employer-shipowner during a pre-sign on physical examination, may recover maintenance and cure when disabled by the concealed illness which did, in fact, recur.

2. Whether the existence of diametrically opposed Circuit Court decisions, creating contradictory rules governing a shipowner's responsibility to pay maintenance and cure benefits does destroy the required uniformity of the Maritime Law and places intolerable and imposible burdens on shipowners, so creating a gross miscarriage of justice.

3. Whether a shipowner, who, in conformity with the Federal Maritime Law governing maintenance and cure benefits, as enunciated by the Circuit Court of its domicile, and as was apparently followed in all other Circuits at the time in question, determined that maintenance benefits were not owing, can be held to have acted arbitrarily and willfully for not anticipating that the Court of Appeals

for the Second Circuit would depart from the accepted rule and create a conflict between the Federal Circuits, and, as a result, be made responsible for the plaintiff's attorneys' fees.

Statutes Involved

A seaman's right to maintenance and cure from his shipowner-employer is based upon the General Maritime Law, as enunciated by the Federal Courts and does not rest upon any statute.

Statement of the Case

The plaintiff seaman commenced a non-jury action in the United States District Court for the Southern District of New York, seeking to recover maintenance and cure benefits from his employer, the owner of the S/S Green Port, Central Gulf Steamship Corporation. The defendant, Central Gulf, refused to honor the claim for maintenance, relying upon the Maritime Rule, as then stated in the unanimously accepted rule of *McCorpen* v. *Central Gulf Steamship Corporation,* 396 F. 2d 547 (5th Cir.); cert. denied 393 U. S. 894 (1968). It should be noted that the defendant in this case and in *McCorpen* is the same steamship company and therefore its refusal to pay maintenance benefits in the present case was far from arbitrary, but was done in reliance upon a rule of law enunciated in the prior case in which it had participated.

The District Court, having heard the evidence, found that the following facts were either undisputed or stipulated: that the seaman knew he had a chronic and spontaneously recurrent plantar wart condition; that, when this condition recurred, he could not perform his duties properly; that he had an obligation to reveal his past medical history to his potential employer; and that he con-

cealed the history of his plantar wart condition. In denying the seaman maintenance, the court found these facts to amount to "a willful failure to disclose a condition material to his ability to perform his duties as an able-bodied seaman."

The Court of Appeals, in reversing, agreed with the District Court that concealment of a previous condition would bar maintenance if the seaman knew the condition was "relevant".

On the stipulated facts of this case, plaintiff knew or should have known that the information he suppressed was relevant and, therefore he should not be allowed maintenance benefits.

But the 2nd Circuit attempted to distinguish the present case, and said:

> "The rule of the McCorpen case, that any concealment of material medical data, prevents an award for maintenance and cure, is not the rule of this Circuit. In *Ahmed* v. *United States,* 177 F. 2d 898, 900 (2d Cir. 1949) this Court held that a seaman 'who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health.' The concealment is fraudulent only if the seaman knows or reasonably should know that the concealed condition is relevant."

The Court said Sammon in their judgment, acted honestly (which apparently means without a sinful or immoral intent), and therefore they would award maintenance. The affront of such substitution of appellate opinion works on the "clearly erroneous" rule is discussed below.

It is proper to note here the latently pernicious effect in this apparent distinction.

Concealment has an accepted legal meaning, uniformly held as "the designed and intentional withholding of any

material fact." (See: Black Law Dictionary.) Therefore unless the further requirement of fraud, as added by the 2nd Circuit is to be more than a tautology, it must connote more than "wilfulness." As shown by the Court's examining the character of plaintiff's conduct as "honest", it is clear that the idea of "fraud" relates to the subjective area of "why" the plaintiff acted rather than the "how".

It is suggested that this new rule, created by the Second Circuit is internally illogical, inequitable to this defendant and to shipowners generally, and completely unrealistic and incapable of practical application. It is also contrary to the weight of the established maritime law.

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit creates a new criteria for determining whether maintenance benefits are due and owing to seamen and creates an extraordinary and intolerable burden on shipowners, and this new rule is, by its terms, in clear conflict with the formerly universal rule of *McCorpen* v. *Central Gulf, supra.*

In addition to the conflict thus created, the rule of the Second Circuit is completely unacceptable and inequitable.

The rule of *McCorpen* was to the effect that if a seaman knowingly and therefore willfully concealed relevant medical material, he was barred from collecting maintenance benefits if he is subsequently disabled because of a condition growing out of the concealed condition. It is no excuse for the seaman to claim that, in his judgment, the matter he concealed was not important. The Second Circuit, however, has now stated that the concealment will be a bar only if the seaman, in his judgment, felt that the matter he was concealing was relevant. It is suggested that this rule which leaves the decision to disclose or not to disclose prior medical history completely in the subjective discre-

tion of a seaman is unrealistic and unworkable. The seaman by neither training nor temperament has the qualifications to judge what medical data is important to his prospective employer. Such a rule is an invitation to fraud since seamen will be tempted if not invited, to label all concealment as innocent, or due to an honest mistake on their part. A determination of whether a willful concealment was "honest" is not the proper stuff for courts of law, but lies, if anywhere, in the province of moral theologians and confessors.

The District Court stated what has to be the only criterion when it said:

> "The test in this case is not merely whether the seaman reasonably expected that his prior condition was one of importance to the shipowner, that is, whether he felt he could reasonably perform his duties. Rather it is that the seaman should provide truthful and complete answers to questions concerning his medical background to give his potential employer an opportunity to study his history and make a judgment as to whether or not he should employ him. The concealment of material medical data prevents entitlement to an award of maintenance and cure for this condition since the causal link to the existing disability is present. No valid contract for employment existed between the parties for this voyage."

In addition, the Second Circuit cited as authority for their rule, the case of *Ahmed* v. *United States*, 177 F. 2nd 898 (2nd Circuit, 1949), as prior support for the rule they were then enunciating. However, in *Ahmed*, there was as a matter of fact, a finding that there was no concealment since an almost impenetrable language barrier existed between the seaman and the shipowner. Any failure on the part of the seaman, Ahmed, to disclose, was due to an in-

ability to communicate and there was therefore no possibility for the question of willful concealment to even arise. As disclosed by the record in the proceedings for certiorari in *McCorpen*, the *Ahmed* case had uniformly been treated as a case where there was no concealment, rather than a case justifying concealment.

The Second Circuit in overruling the District Court, concluded, contrary to the findings of fact below, that there was no evidence to sustain that the plaintiff deliberately suppressed anything relevant. Such a finding is plainly contrary to the undisputed and stipulated facts established in the District Court. The Circuit Court, under the Federal Rules and decisions of Appellate Procedure, had no power to simply substitute their opinions or feelings for that of the Trial Judge where there was clearly no showing that the findings of the Trial Judge were in any way clearly erroneous.

> *Commissioner* v. *Duberstein*, 363 U. S. 278, 291;
> *U. S.* v. *U. S. Gypsum*, 333 U. S. 364, 395.

Furthermore, the action of the Second Circuit in labeling the conduct of Central Gulf as arbitrary because it failed to anticipate that the Second Circuit would soon create a new rule, is unduly harsh, inequitable and a gross miscarriage of justice. Such conduct in and of itself has been held to be a sufficient mandate for this court to grant its writ of certiorari. *Thompson* v. *City of Louisville*, 362 U. S. 199; *Montana* v. *Kennedy*, 366 U. S. 308.

It is further submitted that the decision of the Second Circuit which has labeled the conduct of Central Gulf actionable as to this seaman contrary to the Fifth Circuit decision which had already characterized such conduct by the same shipowner as completely proper, is a denial of due process of law to the defendant.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

WALTER A. DARBY, JR.,
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26 Broadway,
New York, N. Y. 10004.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 498—September Term, 1970.

(Argued March 11, 1971 Decided April 26, 1971.)

No. 33545

EUGENE J. SAMMON,

Plaintiff-Appellant,

—v.—

CENTRAL GULF STEAMSHIP CORPORATION,

Defendant-Appellee.

Before:

HAYS and FEINBERG, *Circuit Judges,*
and CURTIN, *District Judge.**

Appeal from a decision and order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* denying maintenance and cure benefits to plaintiff, a merchant seaman.

Reversed.

* Of the United States District Court for the Western District of New York, sitting by designation.

EDWARD M. KATZ, New York, N. Y. (Abraham E. Freedman, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

WALTER A. DARBY, JR., New York, N. Y. (Foley, Grainger & Darby, New York, N. Y., on the brief), *for Defendant-Appellee.*

HAYS, *Circuit Judge:*

In October, 1964 plaintiff was referred for employment aboard defendant's vessel, the S.S. "Green Port." Before he was accepted, plaintiff was required to submit to a pre-sign-on physical examination by the defendant's physician. In the course of this examination, plaintiff reported, in response to a question concerning any earlier accident, injury or illness, that he had had tuberculosis in 1950. He did not, however, reveal that he once received medical attention for warts on the sole of his right foot. The defendant's physician X-rayed plaintiff's chest and found him unfit for duty solely on the basis of suspected tuberculosis. Plaintiff, pursuing his rights under his union's collective bargaining agreement, obtained another physical examination from the United States Public Health Service Outpatient Clinic in New York City. Since he was found fit for duty he was given employment on defendant's vessel.

While plaintiff was serving aboard the "Green Port" from October 9, 1964 to January 29, 1965, a period of 112 days, there was no recurrence of tuberculosis; but one week before the end of the voltage, a wart developed on the sole of plaintiff's right foot. Plaintiff obtained a master's certificate from the "Green Port's" chief officer in order to be entitled to medical treatment for the wart. He left the vessel and was treated from February 25, 1965 to August 9, 1965 at the United States Public Health Service Hospital, Staten Island, New York. During this period plain-

tiff was certified as not fit for duty, and he sought payment of maintenance and cure from the defendant. Upon defendant's refusal to pay, plaintiff initiated this action in the United States District Court for the Southern District of New York. The district court denied the claim for maintenance and cure on the ground that plaintiff failed to disclose to defendant's examining physician his earlier difficulties with and treatment for a wart on the sole of his right foot.[1] For the reasons hereafter set forth we reverse and remand to the district court to fix the amount to be awarded for maintenance and cure, interest, costs, and counsel fees.

In finding for the defendant, the district court said that a "seaman should provide truthful and complete answers to questions concerning his medical background . . ." and that "concealment of material medical data prevents entitlement to an award of maintenance and cure. . . ." 305 F. Supp. 1071, 1073 (S.D.N.Y. 1969). As authority, *McCorpen* v. *Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir.), cert. denied, 393 U.S. 894 (1968) was cited. The rule of the *McCorpen* case, that *any* concealment of material medical data, prevents an award for maintenance and cure, is not the rule of this Circuit. In *Ahmed* v. *United States*, 177 F.2d 898, 900 (2d Cir. 1949), this court held that a seaman "who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health." The concealment of a previous condition is fraudulent only if the seaman knows or reasonably should know that the concealed condition is relevant.

The record here contains no evidence whatsoever that the plaintiff deliberately suppressed anything which he knew to be relevant. Plaintiff readily revealed his earlier tubercular condition, although that revelation all but cost

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[1] The district court opinion is reported at 305 F. Supp. 1071 (S.D.N.Y. 1969).

him his job on the "Green Port." Plaintiff testified without contradiction that on the date he joined defendant's vessel, he felt well and believed himself fully capable of performing his duties. There is no evidence to indicate that he was not in excellent health for the first 109 days of the 112 days which he spent aboard defendant's vessel. The defendant failed to discharge his burden of demonstrating the falsity of plaintiff's testimony that he reasonably believed himself fit for duty at the time he joined defendant's vessel. See *Burkert* v. *Weyerhaeuser Steamship Co.*, 350 F.2d 826, 831 (9th Cir. 1965). Nothing in the evidence establishes that plaintiff did not in good faith believe himself fit for duty. An honest failure to disclose his prior condition will not defeat his claim. *Ahmed* v. *United States, supra; Burkert* v. *Weyerhaeuser Steamship Co., supra; Diaz* v. *Gulf Oil Corp.*, 237 F. Supp. 261, 263 (S.D.N.Y. 1965) (Feinberg, *J.*).

Reversed and remanded.

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 AD: 15

#35613

EUGENE J. SAMMON,

Plaintiff,

against

CENTRAL GULF STEAMSHIP CORPORATION,

Defendant.

CANNELLA, J.

Action by plaintiff, a merchant seaman, to recover maintenance and cure benefits, pre-judgment interest on any recovery, and counsel fees incurred in his action against defendant shipowner. Judgment for the defendant.

The Court has jurisdiction since the claim is the traditional maintenance and cure action of a seaman under the general Maritime Law.

The parties have essentially stipulated the facts in this case.[1] The Court finds that plaintiff was employed by defendant on the vessel "S.S. Green Port" from October 23, 1964 to January 29, 1965, and that on January 26,

[1] Pre-trial order, dated August 28, 1967.

1965, plaintiff obtained a Master's Certificate relating to a planter's wart on the sole of his right foot. Upon discharge from the vessel on January 29, 1965, plaintiff reported to U. S. Public Health Service Hospital, Staten Island, N. Y. for treatment on February 3, 1965, at which time he was marked "fit for duty" and an appointment was made for February 25, 1965. From February 25, 1965 to August 9, 1965 plaintiff was not "fit for duty" because of the wart on the sole of his right foot. No maintenance was paid for this period. The standard industry rate of maintenance at the time was $8.00 per day.

In addition the Court finds that the plaintiff had been a merchant seaman since 1944 and his work record indicates that in 1963 while employed on the Attleboro, he had warts on his right foot and was treated in U. S. Public Health Service Hospital on Staten Island from May 28, 1963 to December 27, 1963, when he was marked "fit for duty". Hospital records note "no evidence of recurring wart tissue . . . Return after one trip—will call." From January 16, 1964 to February 25, 1964, plaintiff was employed by Moore McCormack on the Argentina, from March 24, 1964 to May 4, 1964 by Grace Lines on the Santa Rita; from May 7, 1964 to June 23, 1964 by Moore McCormack on the Mormac Rio; from September 8, 1964 to September 24, 1964 on a United Fruit Line ship. He left this ship in New Orleans and came to New York by plane. Plaintiff then signed on the defendant's vessel on October 9, 1964. While on the Argentina he obtained a Master's Certificate for the same condition complained of herein. While on the Mormac Rio, toward the end of the voyage, the warts on his right foot troubled him and he obtained a Master's Certificate, after which he went to the U. S. Public Health Service Hospital at Staten Island and received treatment for eight days.

There is no question that the plantar wart condition afflicting the plaintiff was recurrent. There is similarly no dispute that an able bodied seamon cannot perform his

duties properly when he has this condition. Although the plaintiff revealed his prior tuberculosis condition at a pre-sign on physical examination, he did not see fit to reveal his prior recurrent plantar wart condition as part of his past medical history. This he had an obligation to do.[2] The test in this case is not merely whether the seaman reasonably expected that his prior condition was one of importance to the shipowner, that is, whether he felt he could reasonably perform his duties. Rather it is that the seaman should provide truthful and complete answers to questions concerning his medical background to give his potential employer an opportunity to study his history and make a judgment as to whether or not he should employ him.[3] The concealment of material medical data prevents entitlement to an award of maintenance and cure for this condition since the causal link to the existing disability is present. No valid contract for employment existed between the parties for this voyage.[4]

The test of full disclosure does not work a great hardship on the plaintiff since he clearly has the right to appeal a company doctor's decision to the U. S. Public Health Service. In fact in this case he did just that as far as his prior tuberculosis condition was concerned and the U. S. Public Health Service doctor overruled the company doctor. It might well be that they would have similarly overruled an adverse finding by the company doctor on the wart condition, if it was called to the company doctor's attention. The company lost a valuable right, due to what the Court finds to be a willful failure to disclose a condi-

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[2] *Mansi* v. *Isthmian Lines, Inc.*, 1965 A.M.C. 1902 (S.D.N.Y. 1965); *Zackey* v. *American Export Lines, Inc.*, 152 F. Supp. 772 (S.D.N.Y. 1957).

[3] *See McCorpen* v. *Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968).

[4] *See Mansi* v. *Isthmian Lines, Inc., supra.*

tion material to his ability to perform his duties as an able bodied seaman.

Judgment for defendant.[5]

So ordered.

Dated: New York, N. Y.
February 14, 1969

JOHN M. CANNELLA,
U.S.D.J.

[5] The questions of pre-judgment interest and attorneys' fees are rendered moot by the decision of the Court.